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No. 570

In the Supreme Court of the United States

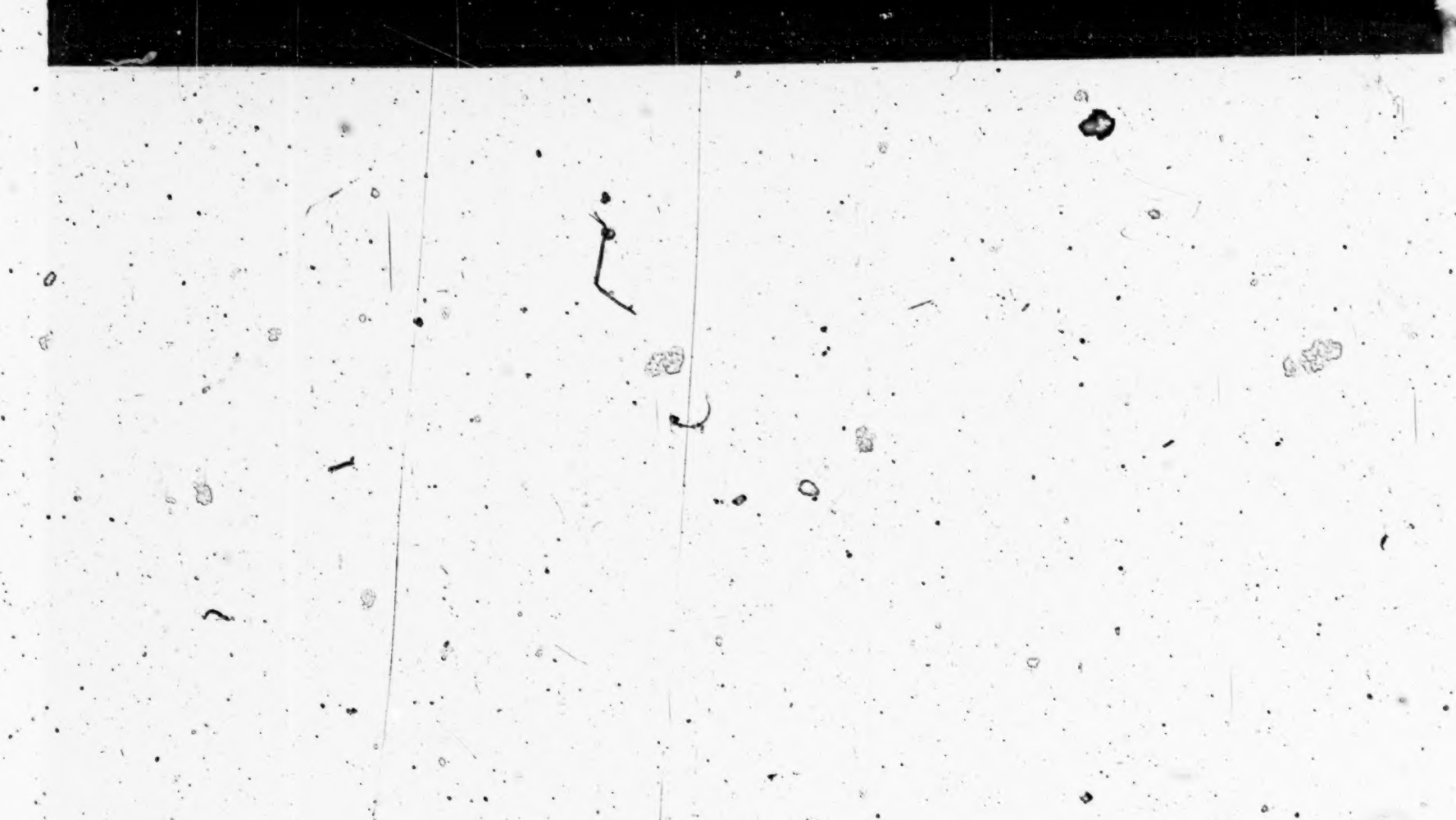
OCTOBER TERM, 1939

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN C. SHAW, ADMINISTRATOR DE BONIS NON OF THE ESTATE OF SYDNEY C. MCLOUTH, DECEASED

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN



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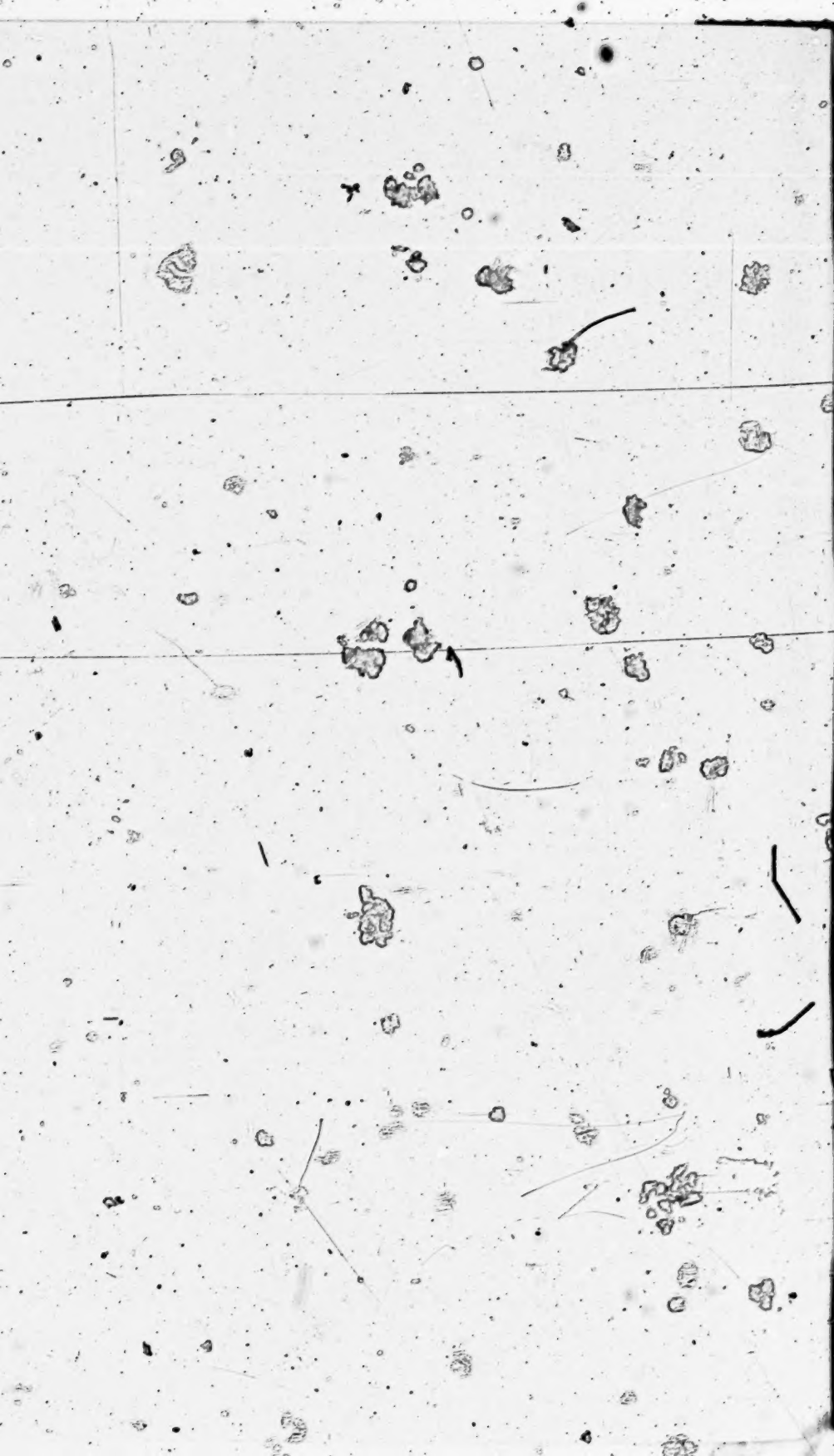

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The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Michigan entered in the above case on September 5, 1939, affirming the judgment of the Circuit Court of St. Clair County, Michigan, which in turn affirmed the order of the Probate Court of St. Clair County, Michigan.

OPINIONS BELOW

The opinion of the Probate Court (R. 13–16) is not reported. The opinion of the Circuit Court of St. Clair County (R. 42–44) is not reported. The opinion of the Supreme Court of Michigan (R. 71–79) is reported in 287 N. W. 477.

JURISDICTIONAL STATEMENT

The judgment of the Supreme Court of Michigan was entered on September 5, 1939 (R. 80). The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925, on the ground that the decision below denied an immunity claimed by the petitioner under the Constitution, statutes, and authority of the United States.

The decision of the court below was that, by reason of a voluntary appearance in the Probate Court of Michigan for the purpose of filing a claim against a decedent's estate, the United States waived or lost its immunity from suit so that the Probate Court acquired jurisdiction to enter an affirmative money judgment against the United States. This decision involves a substantial federal question and is not in accord with the applicable decisions of this Court.

Petitioner raised the federal question orally before the Probate Court for St. Clair County (R. 13–16), on appeal from the judgment of that court against petitioner (R. 18, 42); and on appeal from the decision of the Circuit Court for St. Clair County to the Supreme Court of Michigan (R. 7, 75). Cases believed to sustain jurisdiction of this Court are *Federal Housing Administration, Region No. 4, State Director Raymond Foley* v. *Burr*, certiorari granted, No. 354, October Term, 1939; *Buchanan* v. *Alexander*, 4 How. 20.

QUESTION PRESENTED

Whether the state Probate Court acquired jurisdiction, through the United States filing a claim against

a decedent's estate, to enter an affirmative judgment against the United States on a counterclaim asserted by the estate.

STATUTE INVOLVED

Section 15682 of Chapter 266 of the Compiled Laws of Michigan (1929), which deals with Commissioners of Claims, provides that:

> When a creditor against whom the deceased had claims shall present a claim to the commissioners, the executor or administrator shall exhibit the claims of the deceased in offset to the claims of the creditor, and the commissioners shall ascertain and allow the balance against or in favor of the estate, as they shall find the same to be; but no claim barred by the statute of limitations shall be allowed by the commissioners in favor of or against the estate, as set-off or otherwise.

STATEMENT

In 1918 Sydney C. McLouth entered into a contract with the United States Shipping Board Emergency Fleet Corporation, acting for and on behalf of the United States, for the construction of nine ocean-going tugs (F. A. 107–145).[1] The contract was thereafter cancelled and McLouth and the Fleet Corporation en-

[1] As set forth more fully below, there have been two appeals to the Supreme Court of Michigan in this case. By stipulation of the parties, the record on the first appeal was made a part of the record on the second appeal (R. 2). The record on the former appeal is herein designated as "F. A."

tered into a settlement agreement adjusting the damages arising out of the cancellation (F. A. 145–149). As part of the agreement the Government assumed certain of McLouth's subcontracts and commitments; this obligation was held on an earlier appeal in this proceeding to include one made with the Ingram-Day Lumber Company (F. A. 287–290).

The Lumber Company subsequently obtained a judgment against McLouth for $42,789.96, with interest and costs, representing damages for breach of contract for the furnishing of lumber to be used in the construction of the tugs (F. A. 283–284) and, after the death of McLouth, filed its claim on the judgment in the Probate Court of St. Clair County, Michigan. This claim was allowed (F. A. 284).

In 1933 the United States obtained a judgment against McLouth in the sum of $40,165.48 (R. 30–31), representing damages for conversion of certain materials belonging to the Government, which had been supplied to McLouth for the purposes of the contract (F. A. 189–191), and shortly thereafter filed its claim on the judgment in the Probate Court (F. A. 8–31). The administrator and creditors of the estate sought to have the Ingram-Day judgment claim allowed as a set-off, extinguishing the Government's claim, upon the ground that the Government had assumed McLouth's commitment to the Lumber Company (F. A. 31–49). The Probate Court allowed the Government's claim and denied the set-off (F. A. 49–50), but its ruling as to the set-off was reversed on appeal (F. A. 278–290). See *In re McLouth's Estate*, 281 Mich. 191.

Upon remand the administrator petitioned the Probate Court to—

> grant statutory judgment * * * of the existing balance due said estate (R. 9–11).

The petition was granted and the court (R. 16)—

> ordered, adjudged and ascertained, in accordance with Section 15682 of the Compiled Laws of the State of Michigan, that United States of America is indebted to said estate in the sum of $23,628.97 as of December 8, 1937, and that such indebtedness be and the same is hereby allowed as and determined to be a proper claim which is owing to said estate by the United States of America.

The judgment was affirmed on appeal by the Circuit Court for St. Clair County and by the Supreme Court of Michigan (R. 42–44, 80).

SPECIFICATION OF ERRORS TO BE URGED

The Supreme Court of Michigan erred:

1. In holding that the Probate Court had jurisdiction to enter an affirmative money judgment against the United States on a counterclaim asserted by the decedent's estate.

2. In holding that by filing a claim in the Probate Court the United States consented to the entry of an affirmative money judgment for the balance found to be due the decedent's estate.

3. In failing to hold that the Probate Court was without jurisdiction to enter an affirmative money judgment on the counterclaim of the decedent's estate.

REASONS FOR GRANTING THE WRIT

1. The court below held that, because the United States filed a claim against the decedent's estate, the Probate Court acquired jurisdiction to enter an affirmative money judgment against the United States on the counterclaim asserted by the decedent's estate.

This Court, on the other hand, has frequently held that the United States by instituting suit does not consent to the entry of an affirmative judgment on a counterclaim or cross-demand. *United States* v. *Eckford*, 6 Wall. 484; *Reeside* v. *Walker*, 11 How. 271, 289–290; *Schaumburg* v. *United States*, 103 U. S. 667; *Nassau Smelting Works* v. *United States*, 266 U. S. 101, 105-106; cf. *The Siren*, 7 Wall. 152, 154. In conformity with the decisions of this Court, the lower federal courts have consistently refused to allow recovery of an affirmative judgment against the sovereign. See, e. g., *In re Patterson-MacDonald Shipbuilding Co.*, 293 Fed. 192 (C. C. A. 9), certiorari denied, *sub nom. McLean* v. *Australia*, 264 U. S. 582. *Roumania* v. *Guaranty Trust Co.*, 250 Fed. 341 (C. C. A. 2), certiorari denied, 246 U. S. 663; *United States* v. *Nipissing Mines Co.*, 206 Fed. 431, 434 (C. C. A. 2); *Adams* v. *United States*, 3 C. Cls. 312, 333; *Peterson* v. *United States*, 26 C. Cls. 93, 98.

The court below recognized "some seeming conflict in federal decisions" but chose to follow the rule understood to be found in "the more recent federal decisions" (R. 75, 76). It relied principally on *United States* v. *The Thekla*, 266 U. S. 328, in which case a decree for damages, interest, and costs was entered against a vessel

owned by the United States on a cross-libel in a collision case. But the doctrine of the *Thekla* case has been applied only in admiralty in certain prize[2] and collision cases, requiring settlement of "unusually complicated problems" of liability in one action. See *The Gloria*, 286 Fed. 188, 203 (S. D. N. Y.). It has never been held to permit affirmative judgments in other fields, where the practical and conceptual peculiarities of the admiralty libel are absent. See *Danforth* v. *United States*, 102 F. (2d) 5, 9 (C. C. A. 8), reversed on another ground, December 4, 1939, No. 309, October Term, 1939. The opinion in *United States* v. *National City Bank*, 83 F. (2d) 236 (C. C. A. 2), certiorari denied, 299 U. S. 563, also relied upon by the court below, contains *dicta* approving a more general application, but the actual decision merely affirmed the judgment of the District Court (4 F. Supp. 417, 421) allowing a set-off in the amount of the claim of the United States.[3]

The opinion below suggests that what was done, while amounting to a final arbitration of the parties' rights, was no more than an "ascertainment" of the balance due the decedent's estate without entry of an enforcible judgment. The Probate Court, it may be noted, did more than make a finding of fact; it "ordered" and "adjudged" that the claim of the estate should be "allowed" (R. 16), and it was from that order that

[2] *The Nuestra Senora de Regla*, 108 U. S. 92; *The Paquete Habana*, 189 U. S. 453.

[3] The court also relies upon dicta in *American Propeller Co.* v. *United States*, 300 U. S. 475, 478, and *Guaranty Trust Co.* v. *United States*, 304 U. S. 126, 134. In each case the Court was reasoning from broad analogy and had no occasion to refine its statement of the rule of *The Thekla*.

the Government appealed. But even if it had undertaken simply to make a final, although unenforcible, declaration of the Government's rights, this would have been beyond its power. *United States* v. *Eckford*, 6 Wall. 484.

2. The importance of the question presented, we think, is manifest. The issue is whether the tribunals and procedures carefully established by Congress as the avenues to redress against the United States may be avoided simply because the demands arise by way of counterclaim rather than by way of original suit.

To this question the Court has long since given its answer. The Michigan court conceived that the answer has been revised. But no other court has approved the entry of an affirmative judgment against the United States in litigation outside the field of admiralty. Cf. *United States* v. *United States Fidelity and Guaranty Co.* (C. C. A. 10), decided September 6, 1939, pending on petition for writ of certiorari, filed December 5, 1939. If the rule sometimes applied in admiralty cases is to engulf the settled doctrine to which it is a seeming exception, it seems evident that this should occur only after the deliberate decision of this Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

ROBERT H. JACKSON,
Solicitor General.

DECEMBER 1939.

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